No. 18760

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY,

Appellant,

vs.

JUAN MUNOZ and MARIA MUNOZ,

Appellees.

On Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLEE.

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I.

JURISDICTIONAL STATEMENT.

This action is one based on negligence arising under California law, and jurisdiction in the Court below rests on the ground of diversity of citizenship between the parties, under the statutory authorization of 28 U. S. C., Sec. 1332. Final judgment having been entered in favor of plaintiffs in the Court below, jurisdiction is invested in this Court pursuant to 28 U. S. C., Secs. 1291 and 1294(1).

II.

STATEMENT OF THE CASE.

A. Factual Summary.

Plaintiff was an employee of Continental Can Co., in Los Angeles, California. The defendant railroad company maintained a spur track into the Continental yards. This track ran parallel to a loading dock or platform. On the evening in question, the defendant railroad company was pushing four unlighted gondola cars into the yard on this track. The bell was not ringing and the man who should have been riding the lead end of the lead car (the point) got off of the point before the move was completed (all in violation of the company rules).

The defendant knew that the tracks crossed the customary path taken by Continental employees in going to their eating place. Defendant had not posted any warnings or erected safeguards at this point.

At supper time, 7:30 P.M. (after dark), December 7, 1961, plaintiff left his working place to go to supper in Building O. He took the customary path to the eating room, which was across the platform, down the ladder and across the tracks.

Plaintiff walked across the platform with a lunch pail under his arm, and when at the top of the ladder looked to his left and saw a train on the spur track apparently standing still about 100 to 150 feet away, with no lights, no bell ringing, and no whistle blowing. He saw a man get off from the lead car and stand on the ground. Engine Foreman Baker was standing on the platform about 4-5 feet away from him with a lamp in his hand. Plaintiff had a brief

conversation with Baker concerning the weather. He then proceeded to descend the ladder to the tracks.

Baker did not caution, warn, nor make any attempt to stop or delay plaintiff at that time or at any time prior to the time plaintiff walked onto the tracks.

Plaintiff descended the ladder to the ground. He turned to his right (he was now facing the ladder) and saw the train apparently still standing still. Then he turned around, took 2 or 3 steps towards Building "O" and Baker yelled "Go, go". Plaintiff did not understand what he was saying. He waited at the bottom of the ladder for one or two seconds, walked onto the tracks and was hit by the end of the lead car. During all of this time he heard no bell, whistle or any other noise of the train. He was totally unaware that the cars were moving, having been lulled into a sense of security by the absence of a ringing bell, absence of light on the end of the cars, and Baker standing near him on the platform. The train traveled 4-6 feet after hitting him.

On previous occasions when plaintiff traversed this pathway to Building "O", he always had seen a man with a light riding the point if the train was moving and on those occasions the engine bell was always ringing.

Engineer Malone claims he saw plaintiff while he was walking for a distance of 10 feet towards the edge of the platform where the ladder was located. He also admits that at the slow speed (2-4 miles per hour) at which he was traveling he could stop in 5 to 8 feet and the brakes could be applied immediately. He did not apply the brake until after plaintiff was on the tracks. He admits he was always

looking straight ahead and had no obstructions to his view. There was evidence from defendant's switchman, Trembley, that plaintiff stepped off at the ladder when the front end of the train was possibly 20 feet from the ladder.

Malone admitted that he *did not* blow the train whistle although one of his hands was not occupied and there was no physical reason why he could not do so.

Switchman Trembley got off the point without any signal to do so from Baker before plaintiff started down the steps of the ladder. He saw plaintiff step off at the ladder when the train was possibly 20 feet from the ladder. Yet he did not signal nor call to anybody, including plaintiff.

Baker admits he saw Trembley get off the lead car when the train was 200 feet away. Baker was carrying a lantern which was swinging and may, therefore, have appeared to the engineer as a come-on signal. He saw plaintiff while plaintiff was on the platform and claims that plaintiff was oblivious of the presence of the train and did not look to his left or right. He claims he yelled "No, no" when plaintiff was near the tracks. He gave conflicting testimony as to when he hollered.

Under the existing circumstances of low speed and lighting conditions, it was difficult to distinguish between trains which are moving and those which are standing still, and especially so, if there was no man riding the point.

As a result of being run over by the wheels of the lead car, plaintiff suffered amputation of both of his legs.

The trial court submitted the case to the jury with the usual instructions on negligence, contributory negligence, and gave the qualified instruction on last clear chance, all in accord with the applicable law of California.

The jury found for the plaintiff and a motion for a new trial was denied.

B. The Factual Summary Is Substantiated by the Excerpts From Testimony Set Out Hereinafter.

1. Plaintiff.

Plaintiff Munoz testified that on the night of the accident he was working inside Building "H" [223, 248],* and at approximately 7:30 P.M., he was relieved to go to supper [224]. He was to eat in the lunchroom in Building "O" [224]. He walked out of Building "H" onto the dock, across the dock to the top of the ladder [225]. He looked to his left and saw the train 100 to 150 feet away standing still [225, 226, 250, 251], without lights [226, 249-250], and saw a man get off from the lead train and stand on the ground [226, 227]. He then looked to his right and saw a man, afterwards identified as Mr. Baker, the engine foreman, standing 4 or 5 feet away *on the platform* with a lamp in his hand [227, 228]. He had a conversation with him about the weather while both of them were on the platform [228, 257].

After this conversation he got on the ladder (facing to the ladder as he descended [229]) and went to the ground, turned to his right and saw the train apparently still standing still [231]. It seemed to him not to have

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*Page numbers in brackets refer to Reporter's Transcript.

moved since the first time he saw it [257, 258, 259, 260 and 265]. He then turned around and took 2 or 3 steps toward Building "O", and Baker, on the platform, yelled "Go, go" [231]. He did not know just what he was saying [231] or why he was yelling [232, 263]. Plaintiff turned around toward Baker and saw him still on the platform [232]; he then waited on the bottom of the ladder for one or two seconds before continuing to walk [264]. He took another step and was hit [232]. While walking across the tracks, plaintiff heard no bell ringing or other noise of the train. (Many witnesses corroborated the fact that the bell was not ringing).

On previous occasions when plaintiff saw trains moving in the yard, there was always a man riding the point with a light [270] and the engine bell was always ringing [271, 272].

2. Engineer Malone.

Engineer Malone claimed that he was employed by Union Pacific for 22 years [438] and operated the engine [441], sitting on its right side [438]. The engine, pushing four gondolas, was facing north [439, 484] with dim headlights [440].

When he entered Continental Can premises pushing the gondolas his speed was 4 miles per hour [441] which was unchanged up to the time of the accident [442]; Fireman Fisher was on the left side of the engine [443]; he did not know where Switchman Trembley was [443].

He claimed that Baker was just inside the electric door (which is a few feet from the ladder) [455, 470] and was giving Malone signals with a lantern continuously up to the time of the accident [443, 444].

Baker gave him the signal 2 to 3 times to come forward. He does not recall how far he was from Baker when Baker first signalled him [511], or the distance from Baker when he signalled him the second time [511], except that the point of the train was to the end of the dock [511].

[On deposition, Malone had admitted: The first time Baker gave him a signal to come ahead, the north end of the train was possibly 150 feet away from him (from the electric door) [516] and moved to within 50 feet of the electric door before second signal was given [516]. Prior to the accident Baker was just inside the plant by the electric door, approximately 10 feet from it, when he saw Baker giving violent signals [447]].

He claims he first saw Munoz when Munoz was on the platform 8 feet from the edge of the ramp, 8 or 10 feet south of the ladder [484], and walking towards the edge of the dock [444, 445, 485]. He saw Munoz walk for 8 feet to the edge of the platform [495].

The train was 8 or 10 feet from the ladder when he saw Munoz [446] and approximately 8 feet from the ladder when Munoz stepped off [446].

When Munoz was on edge of platform, Munoz was 10 feet south of the ladder, and approximately 10-12 feet from the electric door [495]. [On deposition Malone admitted: When Munoz was on edge of platform, Munoz was right by electric door [496] and does not know how far the end of the train was from the electric door at the time because he, Malone, was too far away to tell exactly [496]].

He saw Munoz put one hand down on the ramp, on the cement, and step off the platform [445] [contra-

dicted by Baker [771]], which is 3½ to 4 feet high [519], and he claimed that he stopped the train immediately [445]. He saw Munoz carry a lunch pail under his left arm [446] and did observe that he was not looking at the train [446].

The train was going 3 to 4 miles per hour and could stop in 5 to 8 feet [503] and the brakes could be applied immediately either upon seeing a signal of any kind from any other employee [503], or if he chose to apply them.

The train traveled not more than 5 or 6 feet after he applied the brakes [447], and approximately 5 feet after Malone saw Munoz get down.

Baker was the foreman in charge of giving orders to the crew [465]. When Malone saw plaintiff, Baker was just inside the platform on the ground [497], inside the electric door [497] [contradicted by plaintiff [227, 228] and Trembley [714, 715, 687, 688, 689]]. Does not know whether Baker was riding the point or not [504-505]. [On deposition, Malone said Baker was just in advance of the cars being pushed in and about 50 feet north of the electric doors, inside the building, when Munoz got off right at the electric door [498], and that he did not know whether Baker was riding the point or whether he was 50 feet in the building [505]; that he thought Baker was on the point of the car all the time until he hit plaintiff [480]].

It was the duty of all the crew to look out for pedestrians [506]; Malone's duty to either blow the whistle, or put brakes on, or both [506]. If he no longer sees a signal, he stops [456].

He admitted that he did not blow the whistle at any time before the accident [486, 507]; the brakes are ap-

plied by pulling a lever with a left hand [508]; the whistle is right by the brake valve [509]; he had another hand that was not being used [509]; to blow the whistle, all he had to do was pull the whistle cord which is "right from the top of the cab right by my left shoulder" [485] and there was no physical reason why he could not blow the whistle [509]; that the whistle operates instantly [486].

He admitted that he could have blown the whistle when he saw Munoz on the platform walking toward the edge and that he could have blown it before that or at any time [529].

The purpose of the man on the point is to give the engineer a signal if he sees a person on the tracks [481]; he was familiar with the rule requiring a man to ride the point [466]; does not know how long someone rode the point [468-469]. Trembly disappeared from his view [475]; he did not stop when Trembley disappeared [475]. On deposition testified he did not know where Trembley was [477-478] and there was no light from Trembley [478-479]; that he thought *Baker* was on the point all the time until the accident [480]]. When 250 feet from electric door he did not see Trembley, did not look for him and did not know where he was [484].

He did not see any lady walking in the yard [595] although he claims he was looking straight ahead [520]. He saw several people walking around the yard [520].

3. Trembley.

James Trembley testified that he was a switchman for 11 years [678]; in the evening of the accident he was riding on the front edge of the front car as the train entered the Continental Can premises, but got off

at a place about 300 feet from the electric door [680] and remained standing at that place, between the train and the dock [681], and could see Baker [681]. The train at this time was traveling 3 to 4 miles per hour [681]. When he got off the train Baker was *on the dock* about 15 or 20 feet *outside* the electric door carrying a white lantern [680]; 15 or 20 feet *inside* the electric door [681]. There was no man on the ground but he saw *Baker up on platform* standing [714-715] *by the steps* (or ladder) when he saw Munoz come and start down the steps (or ladder) [687, 688, 689]; he saw Baker standing in a position from where Baker could see anybody going down the steps [688] (or ladder) and standing 15 to 20 feet south of Munoz when Munoz was getting down the ladder [693, 694, 695]. [On deposition he said Munoz was 20 feet north of Baker [694]]. He testified that if there is a man on the platform ahead of the train, it is his job to watch for people who might cross the tracks [716]. He claims he saw Munoz step off the dock at the time when the front end of the train was 10 to 15 feet from the ladder [683, 695, 698] or possibly 20 feet [699]. [On deposition he said he did not see Munoz until he was on the ground [701]].

He claims he saw Baker give violent stop sign at the same time Baker yelled at Munoz [685].

He testified that when he rides the point he is the eyes of the engineer [705, 706], and if on the point it would be his job to watch out for people who might cross the tracks [716]. If he had been riding the point all along he would have been able to see Munoz while Munoz was still on the platform and would have given stop signal [702]. Baker never gave Trembley

any order to get off at that point [703]. He doesn't remember engineer blowing the whistle [680]. He is uncertain whether or not he saw Baker give a back up signal [689, 692]. [On deposition he says he saw Baker give back up signal [691]].

4. Baker.

Jack Baker testified that he was the switch foreman in Los Angeles since 1952 [740], and the foreman of the crew on the night of the accident [741].

He observed switchman Trembley get off the lead car after the train was approximately a car and a half down the dock [742], about 200 feet of Baker [765]. Trembley was carrying a white lantern and when he got off the train he leaned up against the dock [744, 745].

Baker gave Trembley no signal to get off [765]. When Trembley got off Baker claimed he was located 10 to 15 feet inside the steel door [745] next to the dock on the ground [745] as the train proceeded towards him, and slowly walked backwards [741, 743, 745]. [This was contradicted by plaintiff [227, 228] and Trembley [714, 715, 687, 688, 689].] [Elsewhere Baker says 20 feet [765], 60 feet [765]; deposition, 60 feet [766]].

He was watching the train all the way [745] and does not remember giving any signals prior to the accident [743]. This was contradicted by Malone [443, 444].

The last time he remembers seeing Trembley, Trembley was about even with the rear end of the engine [758-759]. Trembley was not at the engine when Baker got back from after the accident [759].

Lighting conditions were dark [744], although there were electric lights located overhead on the dock [744].

From the time Trembley got off until Baker gave the stop sign at the time of the accident, Baker claims he gave no other signals [767-768], but Baker says the lantern in his hand may have been swinging and it may have looked like a signal [768]. When Baker gave the stop signal, Trembley was at the rear end of the train, near the engine [772-773]. [Deposition: Did not know where he was then [773-774].] After the accident Baker gave back-up signal to engineer but engineer did not follow signal [778]. Baker did not then see Trembley, does not know where Trembley was and Trembley was not at the engine when Baker arrived at the engine [778]. [Deposition: He saw Trembley at the engine [779] but when he got to the engine, Trembley was not there [779, 780]].

Baker claimed [although contradicted by plaintiff [227, 228] and Trembley [714, 715, 687, 688, 689]] that he was not on the dock near Munoz prior to the accident [782]. When he first saw Munoz the train was 10 to 12 feet from the ladder, and 50 to 60 feet from Baker [755]; Baker claimed that he was 60 feet inside the building and was standing on the ground [746]; the train had been going slowly [761]; Munoz was on the platform at the step (or ladder) [747]. He claims that plaintiff did not speak to him [747]. He saw that Munoz, while he was at the top of the ladder, did not look towards the train nor did he look to the left or right [748]. He saw Munoz prior to his hitting the steps, right on the edge of the dock [746]. Munoz stepped upon the top step of the ladder while descending [757]. When Baker saw Munoz

making a move to go down the steps, he claims he gave a stop sign with his lantern and also started hollering at Munoz; elsewhere he says he began hollering at Munoz when Munoz just reached the ground (and at the same time gave stop sign [756]). [Deposition: Saw Munoz go down steps of ladder [771]. When Munoz got to the bottom of the ladder, Munoz did not look in the direction of the train [754] nor in Baker's direction [754] but looked down at the ground [754].

The distance from the platform to the first rail is 2½ to 3 feet [756]. Munoz took about 2 steps across the tracks and was then hit [757]. The front wheel on the northwest corner of the gondola pinned him down [761]; the leg which remained was on the western rail of Track 5 [785]. The train traveled approximately 4 to 6 feet after hitting Munoz [758]. It traveled 10 to 12 feet from the time Munoz was on the dock to the time it hit him [775-776]; [Deposition: Could not answer this question [776]].

When Baker applied tourniquet, Williams, Baker, Trembley and Continental Can foreman were there [780]. [Deposition: Does not mention Trembley [780]].

Did not hear any bell ringing from the time Trembley got off until the accident [776, 743], nor any whistle [776]; does not remember anyone else coming across the track [761].

5. Whited.

Harold Whited, a guard at Continental Can Company, testified that the train was traveling at a very slow speed before the accident [542]; 4 or 5 miles per hour [545]; he does not recollect any whistle blown

nor any bell ringing [558, 561, 562, 563], nor a man with lantern at the south end of the dock [563-564]. The engine foreman, Baker, *told him that he saw Munoz come down the steps of the ladder on the dock* [572].

6. Fisher.

Gene Fisher, the fireman, testified that the train was traveling 2 to 3 miles per hour [718, 727]. [Deposition: When traveling 2 to 3 miles per hour, that is slower than a man normally walks [730]. The train was going almost as slow as you could go [730]].

Headlights were dim [722]. While sitting in the cab on the fireman's side (left side), he could see if there is somebody on the track ahead, a distance of 200 to 300 feet [724-725]; that it was his duty to keep a lookout [725]. He had seen no signal from Baker or anyone else [725].

While traveling the 200 to 300 feet in the yard, he did not see and does not know the whereabouts of Williams, Trembley or Baker [724]. When he reached the end of the train where plaintiff was lying, he did not see Williams or Trembley there, but he saw Baker and two other men there.

The purpose of the whistle is to warn people [725]. He did not hear the whistle [725-726]; the bell should be ringing [726]. Not in all circumstances should a man be riding the point when cars are pushed in the yard [726]. [Deposition: Not qualified as to circumstances, [727]].

7. Williams.

Harold Williams, the pinpuller [622], testified that the train speed was 4 miles per hour [623, 634];

which was drifting speed [636]. [Deposition: Slower than a man would walk [635, 636]].

No bell was ringing when the train was standing still [649].

Did not see Baker inside the building [737]. [On deposition, said he saw Baker inside building [737]].

Remembers Trembley coming up the left side of the train, although Trembley testified he came up right side of train [739].

8. Carlson.

Fred Carlson testified that he was the general foreman in charge of the night shifts at Continental Can [39]; that the shortest and customary way since 1954 to Building "O" would be to go down the ladder, cross the tracks and then walk across the yard [52, 53]; that the customary time for trains to come in was between 6:00 and 6:30 P.M. [107] and it is lighter at that time than at 7:30 P.M. [53-54].

With the lighting condition there, *it is difficult to distinguish between the moving cars and the cars that are standing still if at a certain distance* [61]. (If standing on the track he would not be able to distinguish the movement quite as readily as standing on the platform [108, 109]).

When a man is on the point with the white light, Carlson could better tell whether or not the car is moving than when there is no man there [61].

That on previous occasions sometimes there was a man riding the point and sometimes not [55, 60-61, 106]. Sometimes the bell rang and sometimes not; *on the night in question he could not hear the bell from where he was* [55].

Baker told him that when Munoz was coming down this stairway, he (Baker) was on the other side of the door, on the dock, which would be approximately 25 feet from the stairwell [68-69]; *that Baker told him that he, Baker, saw Munoz going down the ladder* [69-70, 111]. That the dock is 4 feet from the ground [40].

9. Montoya.

Julian Montoya, an employee of Continental Can, testified *that he heard no bell* [134, 135, 143, 151]. Edward Koscielniak, another Continental Can employee, testified likewise [122, 131]. Montoya does not remember seeing any headlights on the locomotive [138], nor any railroad man with a lantern in his hand on the cars as they were coming in [138].

10. Jeff Tommy Grigg.

J. F. Grigg, Continental Can employee, testified that *it is difficult at night* to see whether *a slow moving train is standing still or moving* [193, lines 9-12, 17, 19, 22-23; 200, 204], even if you can see headlight [201, lines 11-16, 17-26]; nor does it make any difference whether a person is standing on the dock or is down at the pavement [202].

11. Balsavich.

Joseph Balsavich, Continental Can employee, testified that it is customary for employees to walk down the ladder and across the yard, to Building "O" [207-208]; *he heard no bell* [210]. J. F. Grigg testified likewise [193, 194, 199]. Balsavich further testified that it *is difficult to tell whether a car is moving or standing still* [208-209]; even *if train is only 30 feet away* [212, lines 6-25; 213, lines 1-2, 18-25; 214-215]. On previous occa-

sions sometimes the bell would ring, sometimes not [219].

12. Shirley Lawton.

Shirley Lawton, a Continental Can employee, testified that it was dark [344]; *the bell was not ringing* [409]; she did not see any man on the lead train [409], and saw no man with a lantern anywhere on or near the first gondola [409-410]. On previous occasions the bell was ringing and man was on the lead car [410]; the man with a lantern was swinging it all the time she saw him [424]; the train did not change speed all the time she was watching it [432], and was *going slower than she was walking* [432].

III.

ARGUMENT.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON LAST CLEAR CHANCE.

A. Summary of Argument.

1. California law requires that the jury be instructed on every theory of the case advanced by a party if there is *any* evidence on which to base it.

2. There was substantial evidence from which a jury could find that all of the elements necessary for the application of the doctrine existed.

3. The evidence is viewed most favorably to sustain the contention that instruction is proper.

4. The Pre-Trial Conference Order set out last clear chance as an issue in the case.

5. Appellant did not comply with Rule 51, F.R.C.P.

6. Error, if any, was not prejudicial.

7. Authorities cited by appellant are distinguishable.

B. Plaintiff Is Entitled to Instructions on Every Theory of Its Case and Failure to Give Such Instructions Is Reversible Error.

Plaintiff is entitled to instructions on every theory of its case.

> *Peterson v. Devine,* 38 Cal. App. 2d 387, 156 P. 2d 936.

As the California Supreme Court recently stated in *Phillips v. G. L. Truman Excavation Co.* (1961), 55 Cal. 2d 801, 806, 13 Cal. Rptr. 401, 403, 362 P. 2d 33:

> "It is Hornbook law that each party to a lawsuit is entitled to have the jury instructed on all of his theories of the case that are supported by the pleadings and the evidence . . ."

Cases holding the failure to instruct on every theory as error include:

> *Greeneich v. Southern Pac. Co.* (1961), 189 Cal. App. 2d 100, 11 Cal. Rptr. 235;
>
> *Berall v. Squaw Valley Lodge* (1961), 189 Cal. App. 2d 540, 11 Cal. Rptr. 316;
>
> *Stickel v. Durfee* (1948), 88 Cal. App. 2d 402, 406, 199 P. 2d 16;
>
> *Petersen v. Rieschel* (1953), 115 Cal. App. 2d 758, 766, 252 P. 2d 986;
>
> *Rasich v. Gladding McBean & Co.* (1949), 90 Cal. App. 2d 241, 202 P. 2d 576;
>
> *Ribble v. Cook* (1952), 11 Cal. App. 2d 903, 908, 245 P. 2d 593.

In *MacLean v. City and County of San Francisco* (1957), 151 Cal. App. 2d 133, 311 P. 2d 158, the court stated at pages 161-162 (quoting from *Washington v.*

City and County of San Francisco, 123 Cal. App. 2d 235, 238, 266 P. 2d 828, 830):

> "In considering the testimony with a view to determining whether, as a matter of law, there was sufficient evidence to justify the court in giving the instructions complained of, this testimony must be considered in a light most favorable to respondent, for in order to find that the giving of any certain instruction was not warranted by the evidence, the court must find that, as a matter of law, there is in the record not even slight or inconclusive evidence on the point covered by the instruction. In 24 Cal. Jur., p. 832, the rule is stated as follows: 'In order to warrant the giving of an instruction it is not necessary that the evidence upon an issue be clear and convincing, it being sufficient if there be slight or, at least, some evidence upon the issue.' . . .
>
> "And in 53 Am. Jur., p. 457: 'In determining whether there is evidence that will warrant an instruction, the court does not pass on the weight and sufficiency of the evidence. It is not error to submit an instruction covering a theory advanced by a party if there is any evidence on which to base it, although it may be slight and inconclusive, or opposed to the preponderance of the evidence.' "

Applying California law, it was proper for the trial court to instruct on last clear chance under the circumstances.

In the very recent case of *Rebago v. Meraz,* 60 A. C. 1, 31 Cal. Rptr. 777 (July, 1963), the California Supreme Court (in discussing the instruction on assumption of risk) declared (p. 781):

> "It is well settled that it is not error to give an instruction on a theory advanced by a party if there is *any* evidence on which to base it." (emphasis added).

In *Yandell v. Truckaway, Inc.,* 216 A. C. A. 294, 30 Cal. Rptr. 583, 586 (May, 1963), the District Court of Appeal, in reversing the trial court for its failure to instruct on last clear chance, stated:

> "It is well established that if there is evidence which would reasonably support a recovery on the basis of the last clear chance doctrine, it is reversible error to fail to instruct thereon (citations omitted)."

In September, 1963, the California Supreme Court denied a petition for hearing where a unanimous District Court of Appeal reversed the trial court for its failure to give an instruction when, as the District Court put it, "There was evidence from which the jury could have determined that defendant owed a duty to sound his horn." *Weiss v. Baba,* ..... Cal. App. ...., ..., ... (hearing denied).

The United States Court of Appeals for the Ninth Circuit has applied the law of last clear chance as declared by the California Supreme Court and District Courts of Appeal.

In *Churchill v. Southern Pac. Co.,* (1954), 215 F. 2d 657 (C. C. A. 9), this honorable court, in reversing the lower court's action taking the case from the jury, held that last clear chance was applicable in a situation comparable to that in the case at bar.

The court relied on *Girdner v. Union Oil Co.,* 216 Cal. 197 13 P. 2d 915 (the same case cited in *Brandelius,*

infra, as the prime case on last clear chance in California). In *Churchill,* plaintiff testified that he first saw the train when it was 10 feet away and continued to watch it but it did not seem there was any change in the speed. Said the court (p. 661):

> "There was evidence from which the jury might have concluded that (plaintiff) . . . was in a position of danger . . .
>
> ". . . Although Altmeyer testified he was looking in the direction of the crossing and did not see Churchill at any time prior to the accident, the jury was entitled to disbelieve him and find that he actually saw Churchill (citations omitted). And finally, the jury was entitled to draw the inference that Altmeyer was aware of the fact that Churchill would not escape from his peril by the exercise of ordinary care.
>
> ". . . Altmeyer also testified that he immediately put on his brakes, but the jury was not required to believe him in this respect (citing *Sills v. L. A. Transit Lines,* 40 Cal. 2d 630, 255 P. 2d 795)."

The court concludes (p. 663):

> "Since the third element of the doctrine was reasonably raised by the plaintiff's evidence, this element became a question of fact for the jury. 'Whether or not the doctrine of last clear chance applies in a particular case depends entirely on existence or non-existence of the elements necessary to bring it into play. *Such question is controlled by factual circumstances and must ordinarily be resolved by the fact finder.' Daniels v. City and*

County of San Francisco, supra (40 Cal. 2d 614, 255 P. 2d 788)." (Emphasis added).

See also:

Union Pacific Railroad Company v. Ward (C. C. A. 10, 1956), 230 F. 2d 287;

Nicholson v. Stroup (C. C. A. 4, 1957), 249 F. 2d 874.

C. There Was Substantial Evidence to Require an Instruction on Last Clear Chance.

Appellant, disappointed by the unanimous verdict of the jury and the trial court's failure to give it another chance to defend its case, goes to great lengths to split hairs and attempt to argue that the plaintiff was not in a position of danger until he was on the tracks and the train was upon him. It cites many cases but they are clearly distinguishable and not the applicable law as declared by the California courts.

A review of the record shows that there was ample and sufficient evidence to support the jury finding that plaintiff was in a position of danger before he stepped from the foot of the ladder onto the tracks. Plaintiff was in a position of danger from the time he began his descent down the ladder and even while he was walking on the platform towards the ladder with his lunch pail under his arm.

The record shows that there was ample evidence to support a finding that defendant had the last clear chance to avoid the accident, irrespective of which of the aforementioned places was found by the jury to have been the place of danger.

Both hypotheses will be argued separately.

1. Position of Danger as Including the Time Plaintiff Was Walking on the Platform Towards the Stairs.

The factual basis of last clear chance is for the jury to determine.

Churchill v. Southern Pac. Co. (1954), 215 F. 2d 657 (C. C. A. 9);

Buck v. Hill, 121 Cal. App. 2d 35, 263 P. 2d 643.

The factual basis includes the determination of position of danger.

Daniels v. City and Co. of San Francisco (1953), 40 Cal. 2d 614, 255 P. 2d 785;

Peterson v. Burkhalter (1951), 38 Cal. 2d 107, 237 P. 2d 977.

The jury could have found that plaintiff was in a position of danger while he was walking on the platform to the lunchroom with his lunch pail under his arm unaware of the approach of the train.

This is especially so in view of the following attendant circumstances, any one of which would have been sufficient, but cumulatively seem to force this conclusion:

(1) Baker's restricting of his conversation with plaintiff to the weather and his failure to caution plaintiff at that time.

(2) The fact that Trembley left the point, and no one was riding the point.

(3) No bell was ringing.

(4) No whistle was blowing.

(5) The appearance of immobility of the train due to low speed, and no man riding the point, and no lights, bell or whistle.

(6) The fact that the train came in later than usual this evening.

(7) Lighting conditions.

Some of these factors are interrelated.

It is well settled that "position of danger" is not restricted to physical helplessness, but includes unawareness of the peril.

In *Peterson v. Burkhalter* (1951), 38 Cal. 2d 107, 237 P. 2d 977, the California Supreme Court stated (p. 979):

> "This reasoning is based on the *fallacious* assumption that the doctrine of last clear chance is limited in application to a situation *where the plaintiff is physically helpless* to prevent the impending accident through the exercise of ordinary care (emphasis supplied).
>
> ". . . ignores the fact that the *inattentive plaintiff,* as well as the physically helpless one, comes within the scope of the rule (emphasis supplied). It applies '. . . not only where it is physically impossible for him to escape, but also in cases where he is totally unaware of his danger and for that reason unable to escape . . .' *Girdner v. Union Oil Co.,* supra. The continuing negligence of a plaintiff does not bar him from obtaining a judgment against the person who had the last clear chance to avoid the accident."

In *Heffington v. Paul* (1957), 152 Cal. App. 2d 235, 313 P. 2d 157, the court, in holding the refusal to give a last clear chance instruction error, declared:

> "The jury could further have found that appellant, in the exercise of due care, ought to have

known decedent was unaware of his peril while there was still time to avoid running him down."

In *Nahhas v. Pacific Greyhound Lines* (1957), 153 Cal. App. 2d 91, 313 P. 2d 886, the court said:

"It could have been found that Link knew that appellant was in a position of danger from what he observed ahead of him and further knew, or should have known, that he was unable to escape."

In *Hardin v. Key System Transit Lines* (1955), 134 Cal. App. 2d 677, 286 P. 2d 373 (hearing denied), the court affirmed the lower court's giving of the instruction (despite the fact that an intersection was involved).

Concerning the position of danger, the court said (pp. 376-377):

"At least when the motorman received the signal for departure any person nearing the tracks unaware of a possible movement of the train was in danger. . . . If at that time he observed facts indicating that the driver of an oncoming car was inattentive and therefore in danger of continuing onto the tracks the motorman undoubtedly had a clear chance to prevent an accident as he simply had to wait a few seconds longer before starting the train. The jury could hold that waiting those few seconds would not constitute more than ordinary care. The jury could also find plaintiff negligently inattentive and as a result thereof in danger.

". . . In this respect, it should be noted that total unawareness of danger as well as physical impossibility can cause inability to escape by or-

dinary care, *Doran v. City and County of San Francisco, supra,* 44 Cal. 2d 477, 283 P. 2d 1, and 'that the "continuing negligence" of the injured party does not deprive him of the benefit of the last clear chance doctrine if all the required elements for the application of that doctrine are present.' *Doran v. City & County of San Francisco, supra,* 44 Cal. 2d 477, 283 P. 2d 7.

"The treatment of the rule as to total unawareness (negligent inattention) in Section 480 of the Restatement, Torts is instructive with respect to this case. It is said there in Comment b: '* * * the defendant is liable only if he realizes or has reason to realize that plaintiff is inattentive and consequently in peril * * *. However, it is not necessary that the circumstances be such as to convince the defendant that the plaintiff is inattentive and, therefore, in danger. It is enough that the circumstances are such as to indicate a reasonable chance that this is the case. *Even such a chance that the plaintiff will not discover his peril is enough to require the defendant to make a reasonable effort to avoid injuring him.* Therefore, if there is anything in the demeanor of conduct of the plaintiff which to a reasonable man in the defendant's position would indicate that the plaintiff is inattentive and, therefore, will or may not discover the approach of the train, the engineer must take such steps as a reasonable man would think necessary under the circumstances. If a train is at some little distance, the blowing of a whistle would or-

> dinarily be enough, until it is apparent that the whistle is either unheard or disregarded. The situation in which the plaintiff is observed may clearly indicate that his inattention is likely to persist and that the blowing of the whistle will not be effective. If so, the engineer is not entitled to act upon the assumption that the plaintiff will awaken to his danger but may be liable if he does not so reduce the speed of his train as to enable him to stop if necessary." (Emphasis added.)

In the instant case the jury could find that plaintiff was unaware of his danger when he was crossing the platform walking towards the steps, because of the aforementioned factors.

During this time, the jury could find, defendant's agents had several opportunities to avoid the accident.

Following are some of the actions which the jury could find could and should have been taken by defendant's employees, in the exercise of their last clear chances, to avoid the accident.

a. Baker's Last Clear Chance.

Baker could have cautioned or delayed Munoz while plaintiff was on the platform discussing the weather with him, or at any time before he claims to have hollered. It should be emphasized that they were within 5 feet of each other. Trembley corroborated the fact that Baker was on the platform.

The aforementioned is especially true when Baker's own testimony, that plaintiff did not look towards the train while standing at the top of the ladder, is

borne in mind. It was for the jury to determine whether Baker had the last clear chance under all of the circumstances.

In determining the reasonableness of Baker's acts and omissions under the circumstances, the jury might consider that Baker should have realized that:

(1). Plaintiff would reasonably think that the train was stationary because:

(a) Baker's restricting his conversation to the weather would tend to lull plaintiff into a false sense of security;

(b) The absence of a man riding point;

(c) The slow speed of the train;

(d) No bell was ringing;

(e) 7:30 P.M. was not the usual time for the train;

(f) No whistle was blowing.

(2). He (Baker) was the only one who could properly be expected to warn plaintiff, since Baker knew that Trembley was not on the point, and thus could not perform this function, and Baker knew the train was moving.

The jury could likewise have found that Baker should have stopped giving Malone the go-ahead signals earlier than he did, especially in view of the aforementioned factors. The jury could also have found that Baker's failure to control his swinging lantern which was apparently giving signals to Engineer Malone constituted a last clear chance.

Even if they believed Baker's testimony that he was not on the platform, they could find that he could and should have hollered and/or signalled from his lo-

cation (whatever it was) to plaintiff earlier than the time he claims. Baker testified he was facing the train and it was in clear view.

b. Malone's Last Clear Chance.

The jury could have found that Malone had the last clear chance, even according to his own testimony.

He testified that when he first saw Munoz, the train was 8-10 feet from the ladder and Munoz was 8 feet from the edge of the ramp.

Thus, from the first time the engineer saw Munoz, until Munoz was hit, the train traveled at least 8 feet plus 3½ feet, plus the distance between the ramp and the track, plus 1½ feet of track, plus 6 feet after hitting plaintiff.

He was travelling 3-4 miles per hour (5½ to 6 feet per second) and could stop in 5 to 8 feet and the brakes could be applied immediately [503].

Trembley testified that the train was 15 to 20 feet away from plaintiff when plaintiff was getting off the platform (and Malone testified he saw Munoz walking on the platform and descend).

Malone could also have sounded the bell after seeing plaintiff.

Malone could have blown the whistle at any time. Thus Malone had a clear chance to avoid the accident by blowing the whistle, inasmuch as plaintiff could have stopped on the spot before getting on the tracks had he been given the whistle warning.

If the train was moving at 4 miles an hour, it would move 6 feet a second; if the end of the train was 15 to 20 feet away from the ladder when Mr. Munoz was

getting down, it must have been at least an additional 10 or 15 feet further away when Malone first saw Munoz approaching the edge of the platform. This would have given him at least 6 seconds to take action to warn Munoz or stop the train.

c. Trembley's Last Clear Chance.

Trembley testified that the train was possibly 20 feet [683, 695, 698, 699] from the ladder when plaintiff stepped off the dock.

The jury could have found that Trembley should have signalled or hollered to plaintiff at any time before the accident. In determining reasonable conduct on the part of Trembley, the jury could take into consideration the fact that Trembley knew that he had left the point which meant that:

1. He could not be the eyes of the engineer which he otherwise was [705, 706];

2. Plaintiff would all the more tend to think there was no danger because the train was stationary.

That Trembley had ample time to act is indicated by his testimony that the train was possibly 20 feet away from the ladder when plaintiff was first seen by Trembley. Thus, Trembley had ample time, opportunity and reason to warn plaintiff.

2. Position of Danger When Descending the Ladder.

The jury could reasonably infer from the evidence that plaintiff, oblivious to the fact that the train was moving while he was descending the ladder and proceeding towards the tracks, was in a position of danger from which he could not extricate himself and

that the members of the train crew were or should have been aware of this fact. A toot on the whistle by the engineer could have warned him. A ringing bell could have alerted him and the stopping of the slow moving train would have prevented the accident.

According to corroborated evidence, Baker was right at the ladder and could see the entire action. A timely signal from him to the engineer would have stopped the train or at least caused the engineer to blow the whistle.

All of these factors were for determination by the jury under the evidence and the qualified instruction given by the court.

Appellant wants this Court of Appeals to indulge in fact finding in derogation of the jury's prerogative and to decide factually what could or should have been done by the appellant's train crew at the time and place.

According to the great weight of authority in California, neither the jury nor the court is bound by the testimony of the appellant's employees to the effect that they did not see the plaintiff in a position of danger until too late to do anything about it.

The jury had the right to judge the credibility of the witnesses and to determine from all the facts and circumstances what the truth actually was and to infer from the evidence that the train crew did have the last clear chance to avoid injuring the apparently oblivious plaintiff.

They could have found that Munoz was in a position of danger when the train was still 100 or 150 feet away. That Foreman Baker and/or Engineer Malone had plenty of time to give warning or stop the train.

Under the instructions this was a preliminary requirement—that they find from the evidence that a last clear chance existed before applying the doctrine.

D. In Determining on Appeal Whether an Instruction on the Doctrine of Last Clear Chance Should Have Been Given, the Evidence Is Viewed Most Favorable to the Contention That the Doctrine Is Applicable.

Selinsky v. Olsen (1951), 38 Cal. 2d 102, 237 P. 2d 645;

Warren v. Ubungen (1960), 177 Cal. App. 2d 605, 2 Cal. Rptr. 411;

Gulley v. Warren (1959), 174 Cal. App. 2d 407, 345 P. 2d 17;

Lovett v. Hitchcock (1961), 192 Cal. App. 2d 806, 14 Cal. Rptr. 117;

Bonebrake v. McCormick (1950), 35 Cal. 2d 16, 215 P. 2d 729;

Sills v. L. A. Transit Lines (1953), 40 Cal. 2d 630, 255 P. 2d 795;

Daniels v. City and Co. of San Francisco (1953), 40 Cal. 2d 614, 255 P. 2d 785.

E. The California Supreme Court Has Never Reversed a Trial Court for Giving the Last Clear Chance Instruction.

Appellee has not found, nor does appellant cite, a single case wherein the California Supreme Court has reversed a trial court for giving the last clear chance instructions.

The California Supreme Court and the Courts of Appeal have on numerous occasions approved the last clear chance instruction in cases where the facts were similar to those in the case at bar.

F. California Supreme Court Cases.

In May, 1963, the California Supreme Court, in *Shahinian v. McCormick,* 30 Cal. Rptr. 521, *reversed* the trial court for its *failure* to instruct on last clear chance. The court stated (p. 529):

> ". . . and the jury could have found that Mrs. McCormick knew of plaintiff's immobility and knew or should have known he was unable to escape . . ."

In *Sills v. Los Angeles Transit Lines* (1953), 40 Cal. 2d 630, 255 P. 2d 795, the court reversed the trial court's refusal to instruct on last clear chance, pointing out:

> "However, the record shows that these matters involve factual considerations, as the evidence most favorable to plaintiff's theory, if believed by the jury, would have warranted the application of the last clear chance doctrine. *Girdner v. Union Oil Co.,* 216 Cal. 197, 199, 13 P. 2d 915; *Hopkins v. Carter, supra,* 109 Cal. App. 2d 912, 915, 214 P. 2d 1063; also *Galbraith v. Thompson,* 108 Cal. App. 2d 617, 622-623, 239 P. 2d 468."

The Court stated:

> "It was for the jury to determine whether the circumstances were such as would alert a reasonable man as to the danger of plaintiff's predicament and plaintiff's probable inability to escape therefrom."

The Court further pointed out:

> "Thus, while the motorman testified that he immediately applied his brakes when he saw the automobile on the track ahead, the jury might have disbelieved him and accepted plaintiff's statement that there was no decrease in the speed of the approaching streetcar at any time prior to the impact."

In *Daniels v. City and County of San Francisco* (1953), 40 Cal. 2d 614, 255 P. 2d 785, the court reversed the lower court for its failure to give the last clear chance instruction. The Court said:

> "Defendants argue that plaintiffs' automobile was not in a 'position of danger' until it 'jumped forward' from a standing position in the middle lane into the path of the bus as Urdahl veered to the inside lane in an attempt to avoid a collision. But such argument makes no allowance for Urdahl's admitted awareness of plaintiffs' automobile before it even stopped and while he saw it reducing its speed as it came into his path. From this aspect of the evidence it becomes unnecessary to consider decisions upon which defendants rely to the effect that the last clear chance doctrine cannot apply until a position from which the plaintiff cannot escape danger has been reached (citing cases). It would be a disregard of the realities of the situation to hold that under no view of the record could it be said that Urdahl's observation of the slackening speed of plaintiffs' automobile until it finally came to rest in his lane of travel on the 55-mile per hour highway might not reasonably constitute sufficient warning of

> the imminently perilous position created in front of him. Such consideration distinguishes cases where there was no evidence that would sustain a finding of knowledge by defendant of the plaintiff's danger (citation omitted)."

Defendant Urdahl argued that plaintiff Daniels admittedly entered the boulevard at a slow rate of speed and had the better chance of avoiding the accident so that she did not reach a position of danger but was only "*approaching* but . . . not actually *in* a position of danger" and that having come to a stop she could have remained there in place of safety until defendant's bus passed.

> "Defendants further argue that having come to a stop, Mrs. Daniels, to all appearances, was yielding the right of way to Urdahl and invited him to swing to the left or inner lane in front of her; and that as he accordingly changed his course, he could not anticipate that she would create a second emergency by 'jumping' her automobile ahead into the inner lane, when it was not possible for the bus to stop any time to avoid a collision."

Defendants cited Vehicle Code Section 543, which provides that no person shall start a vehicle stopped on a highway unless and until such movement can be made with reasonable safety.

To which the Supreme Court responded:

> "The fact that it could be inferred from the evidence that Urdahl should have foreseen that Mrs. Daniels might proceed forward in response to his slowing down his bus in the middle lane distinguishes such cases as *McHugh v. Market*

St. Ry. Co., 29 Cal. App. 2d 737, 85 P. 2d 467, and *Jones v. Heinrich,* 49 Cal. App. 2d 702, 122 P. 2d 304, relied on by defendants. Likewise not in point are cases involving collisions between two fast-moving vehicles at a street intersection, *Poncino v. Reid-Murdock & Co.,* 136 Cal. App. 223, 232, 28 P. 2d 932; *Dalley v. Williams, supra,* 73 Cal. App. 2d 427, 436, 166 P. 2d 595; *Allin v. Snavely,* 100 Cal. App. 2d 411, 415, 224 P. 2d 113, or between a fast-moving vehicle and a train at a railroad crossing, *Johnson v. Sacramento Northern Ry.,* 54 Cal. App. 2d 528, 532, 129 P. 2d 503, where the act creating the peril occurs practically simultaneously with the happening of the accident and in which neither party may be said to have had thereafter a last clear chance to avoid the consequences. *Rodabaugh v. Tekus, supra,* 39 Cal. 2d 290, 246 P. 2d 663. The relative time, speed and distance factors in the cases where the evidence was held insufficient as a matter of law to permit the application of the doctrine were quite different from those before us."

See also the concurring opinion of Justice Carter, at page 793, wherein he states:

"I concur in the judgment of reversal because I think it is obvious that the reasonable minds might differ on whether or not defendant had a last clear chance to avoid the accident here involved. This is the one and only test which may be applied in determining whether a case comes within the last clear chance doctrine. There was a conflict in the evidence and the trier of fact might well have found that plaintiff Daniels was

negligent in placing herself and Mrs. Smith in a position of peril which was perceived by defendant in time to avoid a collision if he had exercised ordinary care; that plaintiff was unable, by the exercise of ordinary care, to extricate herself and Mrs. Smith from such peril; and that defendant's failure to exercise ordinary care was therefore the proximate cause of the accident. The facts as disclosed by the record justify but do not compel this conclusion."

In *Peterson v. Burkhalter* (1951), 38 Cal. 2d 107, 237 P. 2d 977, the court approved the lower court's giving of the last clear chance instruction (even where an intersection accident was involved). Defendant contended that "the evidence does not show that (plaintiff) was in 'a position of danger', when first observed by him . . . 'A position of danger', he argues, means that the plaintiff must have been so near the path of travel of the defendant's automobile that he could not escape a collision by the exercise of ordinary care," to which the court replied:

"This reasoning is based upon the fallacious assumption that the doctrine of last clear chance is limited in application to a situation where the plaintiff is physically helpless to prevent the impending accident through the exercise of ordinary care. Although Burkhalter cites decisions in which the plaintiff, at the time of discovery, was in the path of the approaching vehicle, neither the opinions in those cases nor any logical reason justifies such a limitation upon the rule. See *Girdner v. Union Oil Company*, supra; *Bonebrake v. McCormick,* 35 Cal. 2d 16, 215 P. 2d 728. When Peterson was first seen by Burkhalter, the vehicles were 75 to 50 feet,

> respectively, from the intersection and traveling at speeds which would place them in the intersection at the same time. To argue that Peterson was not then in 'a position of danger' is to disregard reality."

The Court further points out that defendant Burkhalter knew that Peterson was oblivious to the impending collision, and he excuses his failure to do anything to avert the accident upon the ground that he had no reason to expect continuing negligence on the part of Peterson. However, there is ample evidence from which the jury could determine that a reasonably prudent man, knowing the facts of which Burkhalter was aware, should have foreseen that Peterson might not turn or stop his motor scooter. Under such circumstances, it was negligent for Burkhalter to proceed toward the intersection acting upon a contrary assumption. It is this evidence which distinguishes such cases as *Jones v. Heinrich*, 49 Cal. App. 2d 702, 122 P. 2d 304; *McHugh v. Market Street Railway Co.*, 29 Cal. App. 2d 737, 85 P. 2d 467, and *Choquette v. Key System Transit Co.*, 118 Cal. App. 643, 5 P. 2d 921, relied upon by Burkhalter.

In discussing what defendant should have done in its last clear chance, the Court stated, at page 98:

> "Moreover, Burkhalter's testimony reveals that he made no attempt to avoid the accident by turning his automobile or sounding his horn. It cannot be said, as a matter of law, that he did not have sufficient time in which to do something, and the jury properly might have found that sounding his horn to attract the attention of Peterson would have constituted the exercise of reasonable care on his part to avert the accident. (See Restatement Torts, Sec. 480, comment b.)"

In *Selinsky v. Olsen* (1951), 38 Cal. 2d 102, 237 P. 2d 645, the Court, in affirming the trial court's granting of a new trial because of its refusal to give the last clear chance instruction stated:

> "It does not mean that the doctrine is unavailable when plaintiff is negligent up to the time of the collision, for his negligence is one of the factors that brings it into play. *Girdner v. Union Oil Co.*, supra, 216 Cal. 197, 13 P. 2d 915. . . . Plaintiff's car was stopped from five seconds to a minute before the collision. There is a conflict on that point but it should have been left to the jury under the last chance doctrine instruction . . .
>
> "The second factor is lacking, urges defendant, because there is no showing that defendant was aware of plaintiff's perilous position or knew he could not escape therefrom. That depends upon the view one takes of the evidence. It is true that defendant testified that he did not see plaintiff's car until he was directly behind it, when plaintiff drove his car into the line of traffic in front of him, and that plaintiff's car was in motion at the time of the impact. Other evidence shows, however, that defendant was looking straight ahead as he approached plaintiff's car and his view was unobstructed. It may be inferred therefrom that he saw plaintiff's motionless car extending into the line of traffic (citing cases). Thus we do not have a case in which plaintiff's car was in motion or suddenly appeared in defendant's path as existed in the authorities relied upon by defendant. The jury could have inferred also, that defendant knew or should have known, in the exercise of ordinary care, that plaintiff could not escape. Under the evidence

most favorable to plaintiff, defendant could have seen plaintiff's car standing in the road ahead of him for a minute before the impact and thus could, by the exercise of ordinary care, have avoided the accident.

"The third element was not established, says defendant, because he could not have avoided the collision, having neither time nor means to do so. It was for the jury to determine whether in the space of time involved he could have avoided the collision. From a photograph of Crenshaw Boulevard, put in evidence, and which is pertinent to the issue, *Huetter v. Andrews,* 91 Cal. App. 2d 142, 146, 204 P. 2d 655, it appears that the distance between the cars parked along the curb and the first white line between the two traffic lines, defendant could have swerved to the left without crossing that line to avoid colliding with plaintiff's car."

The Court concludes by saying:

"The negligence of defendant could have consisted of his failure to keep a proper lookout ahead to observe vehicles in his path, which negligence was the proximate cause of the accident."

In *Bonebrake v. McCormick* (1950), 35 Cal. 2d 16, 215 P. 2d 728, the court reversed the trial court for its refusal to instruct on last clear chance.

The Court stated (p. 728):

"This depends on whether there was evidence which would reasonably support a recovery on that theory."

And at page 729:

> "It could be inferred from the facts proved that the boy by his own negligence put himself in a position of danger from which he could not escape by the exercise of ordinary care, that defendant knew of the boy's peril, that she had the last clear chance to avoid the accident by the exercise of ordinary care but failed to do so, and that the boy was killed as a proximate result of such failure."

In *Wright v. Los Angeles Railway* (1939), 14 Cal. 2d 168, 93 P. 2d 135 the Court affirmed the giving of last clear chance where there was a conflict in the evidence as to the facts.

The Court stated (page 140):

> "The final contention made by appellants is that the court erred in instructing the jury on the doctrine of 'last clear chance.' It is not improper to instruct the jury on the doctrine of 'last clear chance,' when, on any valid theory, there is substantial evidence to support the application of that principle. *Gardini v. Arakelian,* 18 Cal. App. 2d 424, 430, 64 P. 2d 181. In the case entitled *Wheeler v. Buerkle,* 14 Cal. App. 2d 368, 373, 58 P. 2d 230, 232, it was said that 'if the facts of a case do not bring the doctrine into play, the court must so decide' and if the facts be such that the doctrine may be applied, it is the duty of a trial judge to submit it to a jury by proper instructions, or to find upon it in the absence of a jury. Upon the state of the record herein presented, it cannot properly be said that the trial court erred

> in instructing the jury thereon. As was said in the case entitled *Kenna v. United Railroads of San Francisco,* 57 Cal. App. 124, 129, 207 P. 35, 37, wherein it was contended that instructions on the doctrine should not have been given: 'There was a conflict in the evidence, and the jury were entitled to be advised as to the law and then to believe the plaintiff's witness, or witnesses, or to believe the defendant's witness.' "

In *Girdner v. Union Oil Co. of California* (1932), 216 Cal. 197, 13 P. 2d 915, the court affirmed the trial court's giving of last clear chance instruction (despite the fact that it involved an intersection accident.)

Said the court (p. 918):

> "The element of continual negligence is present in all last clear chance cases . . . (I)f . . . defendant is able to avoid injuring the negligent plaintiff, and negligently fails to do so, plaintiff's original though continuing negligence only remotely contributes to the injury and hence is not the proximate cause thereof. . . ."

And at page 920:

> "The rule of the last clear chance means just what the words imply, namely, if one has the opportunity of avoiding the injury, he must at his peril exercise it."

In *Center v. Yellow Cab Co.* (1932), 216 Cal. 205. 13 P. 2d 919, where a pedestrian was struck by a cab, the Supreme Court reversed the trial court's non-suit which was based on the fact that plaintiff's contribu-

tory negligence continued to the moment of impact. The case was decided the same day as, and cites, *Girdner.*

See also:

Brandelius v. City and County of San Francisco (1957), 47 Cal. 2d 729, 306 P. 2d 432, wherein the court expressly approves the *Girdner, supra,* decision.

G. Cases of the District Courts of Appeal of California.

In addition to *Yandell v. Truckaway, Inc., supra,* wherein the District Court of Appeal, in May, 1963, reversed the trial court for its failure to instruct on last clear chance, following are numerous cases where the District Courts of Appeal held the doctrine of last clear chance applicable to fact situations similar to that of the case at bar.

In *Lovett v. Hitchcock* (1961), 192 Cal. App. 2d 806, 14 Cal. Rptr. 117, the District Court of Appeal, citing *Brandelius, supra,* affirmed the trial court's giving of last clear chance where there was a conflict in the evidence as to whether defendant saw plaintiff in time to avoid the accident, pointing out that defendant did not apply his brakes, slow down, or sound his horn.

In *Guyton v. City of Los Angeles* (1959), 177 Cal. App. 2d 354, 344 P. 2d 910, plaintiff was struck by defendant police car. In reversing judgment for defendant because of the trial court's failure to give the last clear chance instruction, the court states (p. 914):

> ". . . In determining the issue presented we are required to view the evidence in the light most favorable to appellant's case (citation omitted).

> Accordingly . . . we do not necessarily accept the statement of officer Surratt that 'approximately one second elapsed from the time of first seeing the boy to the time of the collision.' Officer Higgens testified that his car was traveling approximately 17 miles per hour immediately prior to the accident. Officer Long, another witness for defendant, gave testimony from which it could be argued, in conjunction with the physical evidence and the use of a mathematical formula, that Higgins was from 60 to 90 feet from plaintiff when he was first seen and that approximately four seconds elapsed within which to avoid the accident. . . . While '(c) alculations so nice are unavailing to prove anything except the unity of the whole transaction' (citation omitted), and 'the doctrine of last clear chance never meant a splitting of seconds when emergencies arise' (citation omitted) the court stated in *Peterson v. Burkhalter,* 38 Cal. 2d 107, 112, 237 Pac. 2d 977, 980, that the proposition may not be argued that 'as a matter of law, a defendant with two seconds within which to avoid an accident had no chance to do so.' As further observed in the Peterson case, supra, (38 Cal. 2d at page 113, 237 Pac. 2d at page 980) such a defendant may have had 'sufficient time in which to do something' either by turning his automobile or sounding his horn. Here it is undisputed that Higgins made no attempt to avoid the accident by turning or swerving his car . . ."

In *Hensley v. Sellers* (1958), 160 Cal. App. 2d 117, 324 P. 2d 954, the court reversed the trial court because of its failure to instruct on last clear chance,

stating: "The evidence when viewed in the light '. . . most favorable to the contention that the doctrine is applicable . . .' (citation omitted) shows that" the driver knew that the street was used, at this particular time of day, by numerous school buses discharging children and that there were limited pedestrian crossings. "He further testified he saw the plaintiff for a couple of seconds while she stood at the edge of the pavement and before she started to cross the street. The plaintiff had been on the east side of the street looking at a puppy which her parents were going to get her. * * * According to the plaintiff, before crossing Riverside Avenue she looked in both directions and seeing no approaching vehicles started running across the street diagonally in a southwesterly direction. This would have placed her in such position that her back was toward the approaching truck. As she was stepping off the pavement on the west side she turned her head and saw the front of the truck just before it hit her." (*Id.*, 956.)

In *Heffington v. Paul* (1957), 152 Cal. App. 2d 235, 313 P. 2d 157, the court, relying on *Brandelius,* held it was error to refuse to give a requested instruction on last clear chance.

The court stated:

> "Under the facts disclosed by the record, we hold that it was also error to refuse to instruct that the doctrine of last clear chance applies where, the other elements of the doctrine being present, the deceased is totally unaware of his danger and for that reason is unable to escape. . . .
>
> "The jury could further have found that appellant, in the exercise of due care, ought to have

known decedent was unaware of his peril while there was still time to avoid running him down."

In *Nahhas v. Pacific Greyhound Lines* (1957), 153 Cal. App. 2d 91, 313 P. 2d 886, the court reversed the lower court judgment because of its failure to instruct on last clear chance. Significantly the case involved an intersection accident and the evidence of last clear chance was, in the words of the appellate court, "weak".

> "Although the evidence that there was a last clear chance was weak, yet appellant was entitled to have the jury pass upon the situation presented under instructions as to the doctrine . . .
>
> "It could have been found that Link knew that appellant was in a position of danger from what he observed ahead of him and further knew, or should have known, that he was unable to escape. Finally, it could have been found, although here the showing is weak, that Link could have avoided the accident by using due care after knowing both appellant's danger and his inability to escape. In short, the jury could have found that Link did have a last clear chance and negligently failed to utilize it."

In *Parrott v. Furesz* (1957), 153 Cal. App. 2d 26, 314 P. 2d 47, the court reversed the judgment of the trial court because of its failure to instruct on last clear chance, stating:

> ". . . the jury could find that defendant should have known that plaintiff did not intend to turn back into the north-bound lane and instead was proceeding unaware of his peril."

See *Hardin v. Key System Transit Lines* (1955), 134 Cal. App. 2d 677, 286 P. 2d 373 (hearing denied), *supra.*

In *Buck v. Hill* (1953), 121 Cal. App. 2d 352, 263 P. 2d 643 (hearing denied), in approving the trial court's giving of the instruction, the court noted (p. 645):

> "In recent years the courts of California have shown a tendency towards liberality in the application of the last clear chance doctrine (see 'Recent Development in California's Last Clear Chance Doctrine', 40 Cal. Law Review 404, 409). Gailbraith v. Thompson, 108 Cal. 2d 617, 239 P. 2d 468, states that the most recent decisions of the Supreme Court, Peterson v. Burkhalter, . . . and Selinksy v. Olsen . . . show that the development of the law with respect to last clear chance continues in the direction of liberality and that 'no technical distinctions will be permitted to keep the doctrine from the jury where the jury could find the defendant did not act as a prudent man after discovering victim's peril.' "

In *Galbraith v. Thompson* (1952), 108 Cal. App. 2d 617, 239 P. 2d 468, the court affirmed the trial court's giving of the last clear chance instruction where a child darted out into street.

Stated the court (page 471):

> ". . . Nevertheless it would seem that if there is any evidence which might support a verdict on that theory there is less danger in giving the instruction than in omitting it.

"Appellant argues that . . . until the impact (plaintiff's decedent) could at any time be expected to stop . . . (H)owever the inability to escape can also be caused by total unawareness of danger . . . (T)he most recent decisions of the Supreme Court . . . show that the development of the law in that direction continues and that no technical distinctions will be permitted to keep the doctrine from the jury where the jury could find that defendant did not act as a prudent man after discovering the victim's peril.

"Appellant urges that there was no evidence that appellant was actually aware of the child's danger in time to avert it and that he had time to appreciate the situation and to determine on a course of conduct and follow it. *It must be conceded that in that respect the evidence is weak* (emphasis supplied) . . . Under these circumstances it does not seem wholly impossible that the last clear chance doctrine might be applicable and since it was a substantial part of plaintiff's case the question was properly left with the jury."

In an article entitled "Recent Developments in California's Last Clear Chance Doctrine", 40 Cal. Law Review 404 (1952), the author states (pp. 409-410):

". . . Where the jury is given an instruction on that doctrine and finds from the evidence that it applies, appellate courts will tend strongly to uphold the finding.

". . . The present tendency towards liberality is acknolwedged by the Galbraith case . . .

"Thus it appears that in far more cases than previously, the instruction is available, and where

given, a verdict and judgment for the plaintiff is not likely to be reversed if any evidence supports a finding of last clear chance."

In *Huggans v. Southern Pacific Co.* (1949), 92 Cal. App. 2d 599, 207 P. 2d 864 (hearing denied), the court affirmed the trial court's giving of the last clear chance instruction, and stated (p. 869):

> "This confuses knowledge that the train was coming with knowledge that it was approaching so rapidly that it would strike him if he continued heedlessly on his course. Although plaintiff knew that the train was behind him he erroneously formed the conclusion that he had ample time to cross in front of it and he was therefore unaware of his danger."

Additional cases in support of appellee's contention are:

Gulley v. Warren (1959), 174 Cal. App. 2d 470, 345 P. 2d 17, wherein the court stated (p. 20):

> "Although Warren testified at the trial that he did not know the truck was stopped and did not see Gulley until . . . the jury was not required to believe his testimony. . . . The jury could also infer from the evidence that Gulley was unaware of the approach of Warren.
>
> "Even though a witness testifies that he did not see the plaintiff . . . the doctrine of last clear chance is applicable if there is any evidence from which the jury could infer, that the defendant 'must have seen' the dangerous situation in time to have avoided the accident by the exercise of reasonable care."

Mason v. Hart (1956), 150 Cal. App. 2d 349, 295 P. 2d 28.

Wylie v. Vellis (1955), 132 Cal. App. 2d 854, 283 P. 2d 327, involved an intersection accident but nevertheless the court affirmed the trial court's giving of the last clear chance instruction.

Simmer v. City and Co. of San Francisco (1953), 116 Cal. App. 2d 724, 254 P. 2d 185, wherein the court reversed the trial court for its failure to instruct on last clear chance, stating (p. 187):

> "It is required to be given if there is any evidence in the case which would justify its application."

The court indicated that the jury could have believed that defendant saw plaintiff.

Podeszwa v. White (1950), 99 Cal. App. 2d 777, 222 P. 2d 683, which applies last clear chance without mentioning it.

Overacker v. Key System (1950), 99 Cal. App. 2d 281, 221 P. 2d 754.

Cole v. Ridings (1959), 95 Cal. App. 2d 136, 212 P. 2d 597. There, in reversing the trial court for its failure to instruct on last clear chance, the court said (p. 602):

> "It was for the jury to determine under the circumstances whether respondent saw appellant prior to the time he said he did and in time to have avoided the accident in the exercise of ordinary care after he realized or ought to have realized that she was unaware of her perilous position.
>
> "As stated in the late case of Haerdter v. Johnson, 92 Cal. 2d 547, 207 P. 2d 855, 857: 'There is abundant authority that "notwithstanding there

> may be a total absence of any positive testimony that the defendant actually knew of plaintiff's danger, and even though the defendant definitely denies seeing the plaintiff at all, the doctrine of the last clear chance may be invoked and applied where the *facts and circumstances* are such as *would justify the jury in finding that* despite the defendant's denial of knowledge or the absence of direct testimony on the subject, *he was actually aware of plaintiff's danger in time to* avert the accident; in other words that he 'must have known' of plaintiff's danger." (Emphasis added.) Gillette v. City and County of San Francisco, 58 Cal. App. 2d 434, 442, 136 P. 2d 611, 615, second Gillette appeal; see prior appeal, 41 Cal. App. 2d 758, 107 P. 2d 627; . . .'"

Paolini v. City and Co. of San Francisco (1946), 72 Cal. App. 2d 579, 164 P. 2d 916.

Powers v. Shelton (1946), 74 Cal. App. 2d 757, 169 P. 2d 482.

Gillette v. City and County of San Francisco (1943), 58 Cal. App. 2d 434, 136 P. 2d 611.

Therein, last clear chance was held applicable where plaintiff was unaware of the peril of the approaching car and in plain view of the motorman. The

> "inference may be fairly drawn that the motorman must have seen plaintiff and could have avoided the accident by simply sounding his bell as a warning of his approach or applying the brakes and stopping his car, and that therefore his negligence in failing to do either was the proximate cause of the accident, which brought into operation the doc-

> trine of the last clear chance. We are of the opinion that the law as laid down by such cases as Girdner . . . Center v. Yellow Cab Co. . . . Darling v. Pac. Electric Ry. Co., 197 Cal. 702, 242 P. 703; Wahlgren v. Market St. Ry. Co., 132 Cal. 656, 62 P. 308, 64 P. 993; and Hoy v. Tornich, 199 Cal. 545, 250 P. 565 fully support plaintiff's contention . . .".

Pire v. Gladding McBean (1942), 55 Cal. App. 2d 108, 130 P. 2d 143. (In reversing the trial court, the court stated, in discussing the only direct evidence on the subject, that of defendant who testified that he first saw plaintiff when he was about 30-40 feet away: "But the jury was not bound by such direct evidence and the authorities indicate that the other evidence in the record constituted substantial evidence from which the jury might have inferred that defendant Hickey actually saw (plaintiff) and was aware of the dangerous situation when more than 30 to 40 feet therefrom and in ample time to have avoided the accident by the exercise of ordinary care (citations omitted)").

Jones v. Yuma Motor Freight Terminal (1941), 45 Cal. App. 2d 497, 114 P. 2d 438, hearing denied, wherein the court said: ". . . we . . . must view the evidence in the light most favorable to the contention that the doctrine is applicable, indulging every reasonable inference supporting the application of the doctrine. . . . Bearing in mind this rule, we find evidence in the record furnishing justification for giving the instructions in question."

Ladas v. Johnson's Black & White Taxicab Co. (1941), 43 Cal. App. 2d 223, 110 P. 2d 449, wherein

"The taxi . . . was travelling from 10 to 12 miles an hour when he first saw . . . It does not appear when, if ever, he slackened that speed . . . These facts and circumstances give rise to the application of the last clear chance doctrine."

H. The Pre-Trial Conference Order Set Out Last Clear Chance as an Issue in the Case and Was Binding Upon the Court and Parties.

The Pre-Trial Conference Order made in this case set out last clear chance as one of the issues in the case. The Conference Order was entered into by the defendant and there never was any motion made or action taken to amend or modify the same.

Under the law of California, it is proper for a trial court to give an instruction on any of the issues set out in the Pre-Trial Conference Order.

In the case of *Rostant v. Borden,* 192 Cal. App. 2d 594, 13 Cal. Rptr. 553, the court said:

> "She complains that the court erred in instructing the jury on contributory negligence. She does not complain that the instructions given were erroneous but asserts that there was no evidence of contributory negligence to which the jury could apply them. This contention is frivolous. In the first place the trial court order stated that contributory negligence was one of the issues to be tried."

In *Wiese v. Rainville,* 173 Cal. App. 2d 496, 343 P. 2d 643, the court held that even though the defendant did not plead assumption of risk, since the Pre-Trial Order stated that assumption of risk was an issue in the case,

the trial court was sustained in giving instructions on assumption of risk. This opinion is of particular interest since the same court had previously held in the same case that the court erred in instructing on the doctrine of assumption of risk, but a rehearing was granted when the court was advised that the Pre-Trial Order had made it an issue.

See also:

Baird v. Hodson, 161 Cal. App. 2d 687, 327 P. 2d 215.

In the case at bar, in the Pre-Trial Conference Order, page 6, under that portion entitled "ISSUES", issue No. 6 was set out as follows:

> "Causing said train to collide with the person of the plaintiff after having had the last clear chance to avoid doing so."

Since under the law of California, the trial court was obligated to submit to the jury all of the issues set out in the Pre-Trial Conference Order, we respectfully submit that as was said by the court in *Rostant v. Borden, supra,* the contention of the appellant that it was error to give the instruction is frivolous.

I. There Was Not Sufficient nor Timely Objection by Defendant to the Instruction so as to Comply With the Requirement of Rule 51, Federal Rules of Civil Procedure.

Rule 51 states as follows:

> ". . . No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection . . ."

After the instructions were given and before the jury retired, the following colloquy between the Court and defense counsel took place:

> "Mr. Vorkink (defense counsel): At this time, your Honor, I would like to repeat the former objection that I made this morning to the giving of the instruction, Plaintiff's No. 37, on the doctrine of last clear chance. I would like to make that objection on the basis that the evidence does not, there is not a substantial evidence to support each of the necessary elements of the doctrine of last clear chance. As I explained, I base my objection upon the points and authorities contained in the written memorandum regarding last clear chance, which were filed with the court yesterday. May I refer to those?"
>
> "The Court: I don't think you need to, counsel. I don't think it necessary because I have read that and you have supplied the court with the cases.
>
> "Mr. Vorkink: May those points and authorities be considered as objections at this time, your Honor?
>
> "The Court: If you wish.
>
> "Mr. Vorkink: Thank you.
>
> "The Court: Any other objections.
>
> "Mr. Vorkink: No, your Honor."
>
> [p. 1018, line 19, to p. 1019, line 14.]

It is submitted that this does not constitute adequate objection in view of the decisions of this Court.

> In *Woodworkers Tool Works v. Byrne* (CCA 9, 1951), 191 F. 2d 667, 676 (involving *res ipsa loquitur*), the Court said:

"The appellant failed to state *distinctly* to the court below the matter in the change to which it objected and the ground of its objection. The objection made was only a general objection to a charge based on *res ipsa loquitur,* and counsel stated in substance only that the California courts had not extended the doctrine to manufacturers 'except in the beverage cases.' . . . In fact what Woodworkers Tool Works objected to was the giving of any change on *res ipsa loquitur.* It is obvious that the requirements of Rule 51 were not met, and the doctrine of 'plain error' is no longer available to this Circuit."

See also:

American Fidelity & Casualty Company v. Drexler (CCA 5, 1955), 220 F. 2d 930 (last clear chance);

Brandt & Brandt Printers v. Klein (CCA 5, 1955), 220 F. 2d 930 (last clear chance);

Franklin v. Shelton (CCA 10, 1957), 250 F. 2d 92;

Miller v. Delaware, Lackawanna & Western Co. (CCA 2, 1957), 241 F. 2d 116;

Apperwhite v. Illinois Central Railway Co. (CCA 8, 1957), 239 F. 2d 306;

Willits v. Yellow Cab Co. (CCA 7, 1954), 214 F. 2d 612.

We respectfully submit that under the authorities cited, no proper objection having been made, the defendants cannot seek a reversal here on the sole ground that such an instruction was given by the trial court.

J. It Was Not Prejudicial Error to Give the Instructions.

Even if it were error to instruct on last clear chance, the error was not prejudicial. The jury could have held for plaintiff under the general rules of proximate cause. On appeals, as on motions for a new trial, not every error occurring at the trial is so serious as to vitiate the action of the trial court and warrant a reversal of its judgment. The consideration of reviewing courts is directed, not toward a determination of whether an ideal or formally correct procedure has been followed, but to the question whether there has been such a departure from proper practice, and such serious error, as to warrant a reversal of the judgment or order appealed from. 4 Cal. Jur. 2d 498; American Jur. Appeal and Error, Section 1002.

In California the entire process of appellate review is based upon the constitutional provisions to insure that there will be no miscarriage of justice. California Constitution, Article VI, Section 4½. The Constitution provides that no judgment shall be set aside or new trial granted in any case on the grounds of a misdirection of the jury or of the improper instruction of the jury unless, after an examination of the entire cause, the court shall be of the opinion that the error complained of has resulted in such miscarriage of justice.

It has been held that just what is to be included in the phrase "miscarriage of justice" is to be determined in each particular case, since no precise definition is possible. 4 Cal. Jur. 2d 500. It is descriptive of that condition of a cause which justifies a reversal of judgment because the appellate court finds itself in serious doubt whether without the errors complained of the

losing party would have lost his case. *Herbert v. Lankershim,* 9 Cal. 2d 409, cited in 4 Cal. Jur. 2d 500.

Obviously in a case where the evidence showed such patent negligence on the part of the railroad crew (failure to ring bell, failure to have a man on the point, failure to warn, failure to keep a proper lookout, etc.) and where plaintiff Munoz, going about his customary business of going to supper in the usual and customary manner, could easily be lulled into a sense of safety by the foreman on the platform, no lights on the train and no bell ringing, the jury could have found in favor of the plaintiff and against the defendant, even if the last clear chance instruction had not been given.

The verdict could have been based upon the primary negligence of defendant and the absence of contributory negligence on the part of the plaintiff.

The burden of showing prejudice, if indeed there was any, is upon appellant and we respectfully submit that they have failed to do so.

K. Appellant's Cases Analyzed and Distinguished.

All of the following cases cited by appellant in its opening brief are cases impaired by the following infirmities:

1. Are decisions of the intermediate courts of appeal.

2. Are cases which merely affirmed the action of the trial court in not submitting the instruction to the jury.

3. Involve intersection or railroad crossing collisions where the last clear chance doctrine is ordinarily inapplicable.

4. Under the facts, the respective defendants either did all that could possibly have been done, or could have done nothing, to avoid the accident.

Besides the aforementioned common characteristics, additional distinguishing factors are present in these cases, as hereinafter indicated.

Concerning intersection collisions our Supreme Court has stated (*Rodabaugh v. Lekus* (1952), 39 Cal. 2d 290, 246 P. 2d 663):

> ". . . it is apparent that this case presents the picture of one of the usual types of intersection collisions between two rapidly moving vehicles. It has been frequently stated that the last clear chance doctrine is ordinarily inapplicable under such conditions (citations omitted)."

As another Court put it (*Todd v. Southern Pac. Co.*, 7 Cal. Rptr. 448, 450):

> "(O)rdinarily the doctrine cannot be applied to an intersection case involving a collision between two moving vehicles . . ."

Bagwill v. Pacific Electric Railway Co. (1928), 90 Cal. App. 114, 265 Pac. 517 is a relatively old case. Furthermore, the train bell was ringing, the motorman applied the brakes within one second after he saw plaintiff's truck on the track ahead and plaintiff did not contradict the fact that he had knowledge that the train was approaching.

In *Bell v. Huson* (1960), 180 Cal. App. 2d 820, 4 Cal. Rptr. 716, as the court pointed out at page 720:

> ". . . the question as to the applicability of the doctrine takes on added difficulty since the ac-

cident occurred in the approach to an intersection and happened within a second or two."

In *Clarida v. Aguirre* (1957), 156 Cal. App. 2d 112, 319 P. 2d 20, as the Court pointed out (319 P. 2d 23):

> "It was not until the impact that defendant was aware of the danger, and, of course, it was then too late for him to do anything about it . . ."

In *Miller v. Western Pacific Railroad Co.* (1962), 207 Cal. App. 2d 581, 24 Cal. Rptr. 785, there was independent testimony that the whistle of defendant train "was blown for the crossing and it was also blowing specially for the vehicle that was coming down the road." (p. 788).

Furthermore the engine bell was on, the headlight was on bright position and other lights were on.

In *Welsh v. Gardner* (1960), 187 Cal. App. 2d 104, 9 Cal. Rptr. 453, the Court stated:

> "Under any view of the evidence, it fairly appears that defendant's opportunity to avoid the collision after he discovered that Danny was starting out in front of his car . . . was a matter of split seconds and was not the last *clear* chance contemplated by the rule." (p. 457).

The Court further points out *id.*:

> "As to the demonstration before the Court and jury as to timing of the actions of the pedestrians, the trial court saw it and heard the evidence in reference thereto and apparently was not convinced that there was substantial evidence to support the doctrine or that the last clear chance instruction should have been given."

In *Garcia v. Hoffman* (1963), 212 A. C. A. 540, there was nothing else defendant could have done to avert the accident.

In *Kavner v. Holzmark* (1960), 185 Cal. App. 2d 138, 8 Cal. Rptr. 145, the defendant did all he could and saw plaintiff when it was too late to do anything else. Plaintiff was jay walking and was not expected to be there.

In *Chambers v. Southern Pacific Co.* (1957), 148 Cal. App. 2d 873, 307 P. 2d 662, the defendant railroad blew the whistle several times. The case does not involve a pedestrian, since plaintiff was in an auto.

Under the particular circumstances of the case the engineer had a right to assume that plaintiff would remain stopped until the train passed and had no time to avoid the accident.

In *DiSandro v. Griffith* (1961), 188 Cal. App. 2d 428, 10 Cal. Rptr. 595, the defendant did everything he had time to do.

The Court held that (p. 599):

> "The evidence in this case is not sufficient to establish that the defendant had any knowledge of the plaintiff's presence" in time to avoid the accident.

In *Dyer v. Knue* (1960), 186 Cal. App. 2d 348, 8 Cal. Rptr. 753, after plaintiffs entered lane 1 (where the collision occurred), there was nothing defendant could have done to avoid the accident.

In *Todd v. Southern Pacific Co.* (1960), 184 Cal. App. 2d 376, 7 Cal. Rptr. 448, 451, the Court stated:

> "The record contains no evidence from which a jury could infer that (plaintiff) could have

stopped short of the eastbound track . . ." (It would have taken plaintiff only a second to arrive at point of impact. Therefore, sounding a warning would do no good.)

[In the case at bar plaintiff was a pedestrian, and a pedestrian can stop on the spot.]

Nothing more could have been done to avoid the accident in *Todd,* and, as the court points out (p. 454):

> "Because the facts of an accident case are always unique, we do not discuss the cases upon which appellant chiefly relies (*Sills v. L. A. Transit Lines,* 40 Cal. 2d 630, 255 P. 2d 795, *Buck v. Hill,* supra, 121 Cal. App. 2d 352, 263 P. 2d 643), except to state that in our opinion they are not controlling here. They apply, to different factual situations, the same principles that we are applying."

In *Warren v. Ubungen* (1960), 177 Cal. App. 2d 605, 2 Cal. Rptr. 411, as the court indicated:

> "Plaintiff saw defendant's car coming and recognized the danger when he was far enough away to start his motorcycle and proceed in a southerly direction before the collision. Thus through the exercise of ordinary care he could have left the shoulder where he claims he was. Instead, under his own testimony, he proceeded straight ahead and struck the right rear of defendant's car which according to plaintiff's testimony was trying to get out of his way."

Fambrini v. Stikkers (1960), 183 Cal. App. 2d 235, 6 Cal. Rptr. 833, while not an intersection collision, involved special facts. Defendant brought her auto to a stop and plaintiff (on bicycle) hit the fully stopped car.

As the court indicated (p. 836):

> ". . . Several cases are cited for the proposition that it is a jury question as to whether the space of time allowed for avoiding the accident. *Selinsky v. Olsen,* supra; *Durkee v. Atchison, T. & S.F. Ry. Co.,* 159 Cal. App. 2d 615, 324 P. 2d 91. The distinction between these cases and the present is readily apparent. Both involved defendants who failed to take any action for some of the time available to them, and had they done so the accident might have been avoided. In the present case, the evidence is undisputed to the effect that respondent acted immediately and succeeded in stopping her car before it was hit by appellant . . . . . Here the respondent acted immediately and stopped her vehicle."

And at page 837:

> ". . . the blind and unquestioning charge here was made by the bicyclist (plaintiff)".

The remaining cases cited by appellant are distinguishable as follows:

1. Cases of the Court of Appeals.

Hickambottom v. Cooper (1958), 163 Cal. App. 2d 489, 329 P. 2d 609, is distinguishable because the defendant had less than two seconds within which to react.

There was no evidence that defendant therein had any *time* to do anything to avoid the accident. [In the case at bar there was time for each or any one of at least three of defendant's agents to have acted so as to prevent the accident.]

Kowalski v. Shell Chemical Corp. (1960), 177 Cal. App. 2d 528, 2 Cal. Rptr. 319, involved an intersection collision at a *blind corner.*

As the court pointed out:

> "To hold that the last clear chance was applicable here would mean that there would be no intersection collisions to which the doctrine would not apply, and would completely do away with the defense of contributory negligence in such cases. Here it is clear that the accident was caused by the fact that because of the parked vehicles the motorcycle suddenly appeared in front of the oncoming car."

Dalley v. Williams (1946), 73 Cal. App. 2d 427, 166 P. 2d 595, involved a blind intersection, and plaintiff's motorcycle struck the defendant. There was "no evidence" that defendant could have avoided the collision.

As the court pointed out (p. 600), there was:

> ". . . no evidence that defendant could have stopped his vehicle . . . Swerving to the left or right would not have avoided the collision . . ."

2. Supreme Court Cases.

All of the following cases of the California Supreme Court are clearly distinguishable:

In *Hildebrand v. L. A. Junction Railway Co.* (1960), 53 Cal. 2d 826, 3 Cal. Rptr. 313, the Court merely affirmed the trial court's refusal to instruct; the collision was at a railroad crossing, and plaintiff struck defendant railroad train. Furthermore there was a railroad crossing sign painted on the pavement and a crossing

sign on the shoulder of the road. Thus the court stated (p. 315):

> "When the fireman and the switchman first saw plaintiff, they had no reason to believe he would be unable to stop safely or that he was inattentive and would not learn of the danger by observing the railroad crossing sign painted on the pavement, the crossing sign on the shoulder of the road and the train itself."

There was also evidence that the headlight of the locomotive and the street lights over the crossing were lit *and the bell and horn were sounding.* There were strips of "Scotch Light," a reflected substance, on the sides of the locomotive.

[The case at bar did not involve a crossing, there were no warning devices or noises (such as a bell or horn) and there was knowledge on the part of defendant that the plaintiff was inattentive (two of defendant's principal witnesses testified that plaintiff did not observe the moving train as he walked towards the tracks).]

In *Rodabaugh v. Lekus* (1952), 39 Cal. 2d 290, 246 P. 2d 663, where the court merely affirms the action of the trial court, "There was no material conflict in the evidence" (p. 664), plaintiff's decedent failed to heed stop warnings against him which were directly within the range of his vision, and defendant was traveling on a through highway. Declared the Court (p. 665):

> "Disregarding for the moment the fact that defendant was traveling on the through highway and decedent was traveling on a road which was

plainly marked with stop warnings, it is apparent that this case presents the picture of one of the usual types of intersection collisions between two rapidly moving vehicles. It has been frequently stated that the last clear chance doctrine is ordinarily inapplicable under such conditions. (Citations omitted).

"As was said in *Poncino v. Reid-Murdock & Co.*, supra, 136 Cal. App. at page 232, 28 P. 2d at page 936:

> 'Like many other cases involving collisions between moving vehicles, the accident may be said to have happened within the twinkling of an eye after the first indication of danger. While the doctrine of last clear chance has been applied in certain exceptional cases involving collisions between moving vehicles, we are of the opinion that it should not be applied to the ordinary case in which the act creating the peril occurs practically simultaneously with the happening of the accident and in which neither party can fairly be said to have had a last clear chance thereafter to avoid the consequences.' "

The Court further points out that "plaintiffs failed to indicate in which direction they believed the defendant should have attempted to turn under these circumstances." [Appellees, in the case at bar, however, indicate the courses of action which were available to defendants' employees].

The Court goes on to distinguish some important last clear chance decisions (p. 667):

> "Plaintiffs cite . . . decisions, in which the last clear chance doctrine has been applied. *Bone-*

brake v. McCormick, 35 Cal. 2d 16, 215 P. 2d 728; *Center v. Yellow Cab Co.,* 216 Cal. 205, 13 P. 2d 918; *Bragg v. Smith,* 87 Cal. App. 2d 11, 195 P. 2d 546; *Root v. Pacific Greyhound Lines,* 84 Cal. App. 2d 135, 190 P. 2d 48, *Gillette v. City and County of San Francisco,* 58 Cal. App. 2d 434, 136 P. 2d 611; *Yates v. Morotti,* 120 Cal. App. 710, 8 P. 2d 519. . . . but they are all distinguishable on their facts. In none of the cited authorities was a through highway involved nor was there such a relation between the time, distance and speed factors as is found in the present case."

A District Court of Appeal case itself distinguished *Rodebaugh.* In *Buck v. Hill* (1953), 121 Cal. App. 2d 352, 263 P. 2d 643 (hearing denied) the court said:

"There (in Rodebaugh v. Tekus) defendant's total time for reaction and effective action was somewhere between 1 ¼ and 1¾ seconds, where here defendant after he had completely reacted and started to apply his brakes had more than two seconds for effective action."

In *Doran v. City and County of San Francisco,* 44 Cal. 477, 283 P. 2d 1, the Court merely affirmed the actions of the lower court.

Furthermore, as the court pointed out at page 5:

"Plaintiffs concededly knew . . . that it (the bus) was moving toward them . . . With this knowledge, they proceeded to step directly into the path of the oncoming bus; and in the light of this admitted knowledge, it cannot be said that plaintiffs were 'totally unaware' of their

danger. Total unawareness of the danger, as contemplated by doctrine, does not exist where the injured party is fully aware of the approach of an oncoming vehicle up to the instant before the collision and then shifts his attention to look in some other direction while proceeding directly into its path."

[In the case at bar, plaintiff testified that he thought the train was standing still. The reasonableness of that assumption was bolstered by the corroborative testimony of independent witnesses that, under the circumstances, it was difficult to tell whether the train was moving or not.]

In *Shahinian v. McCormick* (May, 1963), 59 Adv. Cal. 575, 30 Cal. Rptr. 521, the Supreme Court, as previously pointed out herein, *reversed* the lower court for its *failure* to instruct on last clear chance.

In *Brandelius v. City and County of San Francisco* (1957), 47 Cal. 2d 729, 306 P. 2d 432 the court merely affirmed the action of the trial court in granting a new trial, and as the court points out "It is well settled that the granting of a motion for a new trial rests so completely within the discretion of the trial court that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears (citations omitted)."

Moreover, the court merely revised, for reasons of clarity, the form of the instruction, and this revised form was used in the case at bar.

The court made no change in the substanstive law of last clear chance. The court expressly so stated at page 441:

"In restating the formula, it has not been our purpose to add or detract from the conditions prescribed in the approved formula set forth in the Girdner case and reiterated in our recent decisions."

IV.

CONCLUSION.

Under the law of California, applicable to the case at Bar, it not only was proper for the trial court to give the qualified instruction on last clear chance but it would have been error not to have done so.

The jury was entirely justified in finding from the evidence that the negligence of defendant railroad company was the sole proximate cause of the devastating injuries to the plaintiff, or to find that regardless of any negligence on the part of plaintiff, the negligence of the railroad company continued after they had the last clear chance to avoid the accident.

The liability questions so overwhelmingly preponderated in favor of plaintiff, that it would be a grave injustice to require him to try his case again.

The facts and the law justify an affirmance of the judgment.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

IRVING H. GREEN.